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IN THE

Supreme Court of the United States

October Term 1938

No. 73

STATE OF MINNESOTA, by its Attorney General,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR STATE OF MINNESOTA.

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I.

OPINIONS BELOW.

The order granting condemnation to the State by the Federal District Court, District of Minnesota, Fifth Division, appears in the Record at page 53 and no opinion has been made. The opinion of the Circuit Court of Appeals for the

Eighth Circuit is found in the Record at page 80 and is reported in 95 Fed. (2d) 408.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals, Eighth Circuit, to be reviewed was dated and entered March 12, 1938 (R. 82). Petition for writ of certiorari was filed on May 31, 1938, and granted on October 10, 1938. Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

This proceeding originated in an action by the State of Minnesota through its Attorney General and at the request of its Commissioner of Highways to condemn an easement for trunk highway purposes in Cook County, Minnesota, on lands allotted in severalty to individual Indians. The proceeding was commenced in the State District Court, Eleventh Judicial District, Cook County, Minnesota, on February 6, 1936 (R. 1-11). The condemnation was instituted in the furtherance of the permanent location and subsequent construction of constitutional route No. 1, now known as state trunk highway No. 61 and United States highway No. 61, as authorized by Article 16 of the State Constitution and the Public Highways Act, Chapter 323, Session Laws of Minnesota of 1921. The easement sought was for right of way for trunk highway purposes, concerning nine non-contiguous, separate parcels of land which had been allotted in

severalty to individual Indians by the issuance of trust patents. The lands allotted in severalty to such individual Indians form a part of the Grand Portage Indian Reservation granted for the use and benefit of the Grand Portage Band of Chippewa Indians of Lake Superior by Treaty of September 30, 1854 (10 Stat. 1109) and an Act of Congress approving January 14, 1889 (25 Stat. 642).

This reservation is located on the north shore of Lake Superior in Cook County in the extreme northeastern part of the State of Minnesota. Of the original area of the reservation, approximately 25,000 acres were allotted in severalty to Indians of the Grand Portage Band and approximately 16,000 acres were open for public settlement. The present location of state trunk highway No. 61, as it traverses Cook County, Minnesota, is now on a temporary route only. The temporary trunk highway as now situated in Cook County, is a narrow winding road, originally a logging road and then a county highway which was temporarily taken over by the Highway Department until such time as the Commissioner of Highways, pursuant to law, would make a permanent location of the highway through Cook County. Mason's Minnesota Statutes for 1927, Section 2554, Subdivision (3), thereof, provides in effect that until such time as the Commissioner of Highways may definitely locate and permanently construct the several routes of the trunk highway system, he shall select practical routes along the general location, as set out in Article 16 of the Constitution, which routes are to be known as temporary trunk highways and be maintained for the benefit of the traveling public until such time as a permanent location is made. The present location in Cook County is, therefore, but a temporary one and this proceeding concerns the acquirement of the right of way for the permanent or final location of the road.

In the early part of the year 1934, the Highway Commissioner of the State of Minnesota determined to make the permanent location of trunk highway No. 61 in Cook County. Under Article 16 of the Constitution of the State of Minnesota this highway is designated as beginning at a point on the boundary of the States of Minnesota and Iowa and thence extending northerly through the city of St. Paul and thence in a northeasterly direction to a point on the boundary line of the State of Minnesota and the Province of Ontario in the Dominion of Canada. The part of the highway now affected by the permanent location of the road in Cook County lies between the boundary line of the State of Minnesota and the Province of Ontario and the Reservation River in Cook County, Minnesota. On February 15, 1934, the Commissioner of Highways filed, pursuant to law, his center line and width orders designating the permanent location, which orders are found in the record, as petitioner's Exhibits 1 and 2 (R. 41, 44).

After the filing of these permanent orders definitely locating the trunk highway in question, the State of Minnesota did acquire by purchase and by the exercise of the power of eminent domain, easements along the entire line of said trunk highway from Reservation River to a point approximately one and a half miles west of the Village of Grand Portage except over and across the nine noncontinguous parcels of allotted Indian lands concerned in this case. The permanent location from a point one and a half miles west of said Village of Grand Portage to the Canadian boundary has likewise been permanently located by the commissioner of highways and while the permanent location of the trunk highway through Cook County, affected herein, is entirely within the Indian Reservation, yet the only allotted Indian lands affected are those concerned with in the present

proceeding, in addition to a separate condemnation covering one parcel of allotted Indian land now pending in the State court.

Subsequent to the commencement of the proceeding a stipulation dated April 7, 1936, was entered into between the State and the United States Attorney for the District of Minnesota (R. 24), providing for the removal of the case from the District Court, Cook County, Minnesota, Eleventh Judicial District, to the United States District Court for the District of Minnesota, Fifth Division, and under order dated April 8, 1936, pursuant to said stipulation, the State court ordered the removal of the case for hearing and further proceeding to the Federal District Court (R. 26). Such stipulation also provided, in part, "at which time the petition of the State of Minnesota may be heard and such proceedings had thereon as prayed in the said petition" (R. 25).

The condemnation petition came on for hearing before the Federal District Court, District of Minnesota, Fifth Division, on September 16, 1936, at which time the State presented its petition and the Court received in evidence such center line and width orders, as well as a map showing the specific parcels of allotted Indian lands sought to be acquired for trunk highway purposes (R. 41-48). The United States appeared specially, objecting to the granting of the petition and sought a dismissal of the proceedings on the ground, among others, that the court was without jurisdiction for the reason that the United States had not consented to the maintenance of the condemnation suit against it (R. 48).

On December 23, 1936, the said Federal Court made and entered its order denying the motion of the United States and granting in all things the petition of the State of Minnesota (R. 58), expressly adjudging "that the consent of the

United States to bring these proceedings against the Indian allottees has been expressly granted and given by the United States to the State of Minnesota, pursuant to 25 U. S. Code Annotated, Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings" (R. 57).

The United States on March 18, 1937, appealed from such order granting the State's condemnation to the Circuit Court of Appeals, Eighth Circuit (R. 69), and pending such appeal the State made a motion for dismissal thereof on the grounds that the order was not appealable and that the appeal was prematurely and untimely made (R. 77), which motion was denied by the Circuit Court without prejudice to the State to renew the motion in connection with the presentation of the merits of the case (R. 79). On March 12, 1938, the Circuit Court rendered its decision and judgment reversing the lower Federal Court and directing a dismissal of the condemnation proceeding (R. 82). The mandate was issued to the lower Federal Court, March 31, 1938 (R. 83). The State made due petition for writ of certiorari which was granted by this Court on October 10, 1938.

IV.

QUESTIONS PRESENTED.

1. Whether or not Section 3 of the Act of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A. Sec. 357) authorizes the State of Minnesota to condemn under its State laws for State trunk highway purposes lands allotted in severalty to individual Indians in the same manner as though the Indians were the fee owners thereof, and grants consent thereto without making the United States a necessary party to said proceedings.

2. Whether or not the Treaty of September 30, 1854 (10 Stat. 1109) with the Grand Portage Band of Chippewa Indians of Lake Superior, and the subsequent Act of Congress approving same January 14, 1889 (25 Stat. 642) expressly grants to the State the authority to construct highways over and across lands allotted in severalty to individual Indians, upon paying just compensation therefor as provided by the last sentence of Article III thereof as follows: "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

3. Whether or not the State, in its sovereign capacity and in the exercise of its governmental functions in the location and construction of a constitutional State trunk highway required to be so located and constructed by its Constitution and laws, may exercise its inherent power of eminent domain for such purposes over and across lands allotted in severalty to individual Indians, either with or without express Congressional authority therefor.

V.

STATUTES, TREATY AND STATE CONSTITUTION INVOLVED.

There are four statutes primarily involved in this case, as follows:

(a) Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084 (25 U. S. C. A. 357) as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as

land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

(b) Act of March 3, 1901, Chapter 832, Section 4, 31 Stat. 1084, (25 U. S. C. A. 311), which provides:

"The Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

(c) Act of Mareh 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 319) providing at the beginning of said Act:

"The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines * * * through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, * * *. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval, * * *."

(d) Treaty between Federal Government and the Grand Portage Band of Chippewa Indians of Lake Superior, dated September 30, 1854, (10 Stat. 1109) and the Act of Congress

approving January 14, 1889, (25 Stat. 642), the salient portion of the Treaty found in the last sentence of Article III thereof, as follows:

> "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

(e) Constitution of the State of Minnesota, Article 16, Section 1 thereof, as follows:

> "There is hereby created and established a trunk highway system, which shall be located, constructed, reconstructed, improved and forever maintained as public highways, by the State of Minnesota. The said highways shall extend as nearly as may be along the following described routes, the more specific and definite location of which shall be fixed and determined by such boards, officers or tribunals, and in such manner, as shall be prescribed by law, but in fixing such specific and definite routes there shall not be any deviation from the starting points or terminals set forth in this bill, nor shall there be any deviation in fixing such routes from the various villages and cities named herein, through which such routes are to pass."

Route 1 thereof, described in the Constitution, is the location of the trunk highway concerned herein.

(f) Section 2534, Subdivision 1, Mason's Minnesota Statutes 1927, a portion thereof, concerning the powers of the commissioner of highways, as follows:

> "The commissioner of highways is empowered to carry out the provisions of Section 1 of Article 16, of the Constitution of the state, and is hereby authorized to acquire by purchase, gift, or condemnation as provided by statute all necessary right of way needed in laying out

and constructing the trunk highway system, and to locate, construct, reconstruct, improve and maintain such trunk highway system, * * *; and in carrying out the provisions of said Section 1, of Article 16 of the Constitution of the State, is hereby authorized to expend out of the trunk highway fund such portions thereof as may be available for the purposes herein provided, * * *."

VI.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in reversing with direction to dismiss the order of the District Court of the United States, District of Minnesota, Fifth Division, granting the State's condemnation.

2. The Court erred in construing Section 3 of the Act of March 3, 1901, (25 U. S. C. A. 357) as being subordinate and subject to the consent of the United States to the State's condemnation proceedings, and that the State's condemnation for the opening of the state trunk highway was conditioned upon such consent as provided in Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311).

3. The Court erred in failing to interpret and construe the Treaty between the Federal government and the Grand Portage Band of Chippewa Indians of Lake Superior of September 30, 1854 (10 Stat. 1109) and the Act of Congress approving January 14, 1889 (25 Stat. 642) and particularly the express right granted under the terms of the treaty as approved by Congress which, under Article 3, the last sentence thereof, contained a direct covenant that "all necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of

way through the same, compensation being made therefor as in other cases."

4. The Court erred in precluding the State from exercising its inherent power of eminent domain for a public purpose necessary and requisite in the performance of a duty imposed by its Constitution and laws, requiring the State to locate and construct its trunk highway system, where such governmental function would not be prejudicial to or inconsistent with the use of said lands by the individual Indians or the Federal government.

VII.

ARGUMENT.

A.

FEDERAL STATUTE AUTHORIZES STATE'S CONDEMNATION.

1. *Section 357 (25 U. S. C. A.) authorizes and permits condemnation of allotted Indian lands for any public purpose.*

The State relies, as authority for its condemnation proceeding, upon the Act of Congress of March 3, 1901, Chapter 832, Section 3, 31 Stat. 1084, (25 U. S. C. A. 357), hereinafter for convenience referred to as Section 357, which by its terms expressly authorizes and consents to the condemnation of allotted Indian lands for any public purpose under the state or territorial laws where the land is located. This Federal statute is so clear, concise and free from ambiguity in its meaning that there can be no plausible argument but that Congress gave its express consent to a proceeding of this kind and granted direct authority to condemn lands allotted

in severalty to Indians for any public purpose, as provided by the Act itself, as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

A statute, plain and explicit in its terms, can be given only one interpretation as this Court has so aptly stated in American Express Company vs. U. S., 212 U. S. 522, page 535, as follows:

> "But we are to consider the language which Congress has used in passing a given law, and when the language is plain and explicit our only province is to give effect to the act as plainly expressed in its terms."

The Department of Interior, having the administration of Indian lands and affairs, in construing this act has consistently followed this simple rule of construction for over thirty (30) years, as evidenced by its Land Decisions and Regulations hereinafter discussed.

The question of the right of a State or political subdivision to condemn allotted Indian lands for public purposes has been determined and settled by the Department of Interior, both prior and subsequent to the enactment of said Section 357. Prior to such enactment, the Secretary of the Interior applied to the Attorney General for an opinion on two questions, (1) "Does such right of eminent domain exist, either in the United States government, or in the State of Montana, as warrants the taking of any part of the lands awarded to the Crow Indians in severalty for the purposes mentioned?" and (2) "In which sovereign does that right exist, the United States government, or the State?"

The opinion and answer to these questions was prepared by Assistant Attorney General Hall on June 25, 1894, and duly approved by the Honorable Hoke Smith, Secretary of the Interior, when such an opinion was adopted as a ruling of the Department. This decision is found in the decisions of the Department of Interior relating to public lands, Volume 19 Land Decisions 24, in which the first question is answered by upholding the right of a State to condemn allotted Indian lands for public purposes. In answer to the second question as to which sovereign has the right to condemn, the decision holds, "In conclusion it follows that the State of Montana has the right to condemn, under proper procedure, for public purposes, lands embraced in Indian allotments in said State." It therefore appears that pursuant to the Department's own decision, even before the express right to condemn as evidenced by Section 357 supra was enacted, it recognized the right of a State to condemn allotted Indian lands for public purposes and by so doing, no doubt numerous condemnations of such lands were successfully conducted by the various States and political subdivisions. Later Land Decisions of the Department issued subsequent to the enactment of Section 357, as well as the said Department's Regulations promulgated pursuant thereto, will be discussed after consideration is given to the enactment of Section 357. Suffice it to state at this juncture that such later Land Decisions and Departmental Regulations are in harmony with this first Land Decision.

2. *Section 357 is an amendment to the Act relating to Indian lands and is separate and distinct from the other provisions thereof.*

We now come to the enactment of Section 357 which is the last paragraph of Section 3 of the Act of March 3, 1901.

Said Act was primarily an appropriation act, and, in accordance with the well established practice of Congress, certain provisions of general law were added or tacked on, so to speak, to the appropriation measure. It is well known that many of the most important acts of Congress pertaining to the Indians and their lands have been enacted as "riders to the appropriation bill." The Congressional Record of the Senate of the 56th Congress, Second Session, Volume 34, Part 2, discloses such to be the case, for such record discloses said proceedings on January 25, 1901, in the Senate concerning said Section 357. The record on pages 1447 and 1448 is as follows:

> "The reading of the bill was continued to the end of section 3, on page 67.
>
> Mr. Pettigrew: The Committee on Indian Affairs authorizes me to offer an amendment, and I think it should come in at the end of section 3, after line 11, on page 67. I send it up now, and I call the attention of the Chairman of the Committee to it.
>
> The Presiding Officer: The proposed amendment will be read.
>
> The Secretary: Insert at the end of line 11, on page 67 the following: 'That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.'
>
> Mr. Thurston: The Committee authorized the moving of this amendment. I will look it over.
>
> The Presiding Officer: The reading of the bill will be continued.
>
> The Secretary resumed and concluded the reading of the bill.
>
> Mr. Thurston: The amendment proposed by the Senator from South Dakota is in accordance with the rec-

ommendation of the Committee, and I ask that the Senate agree to it.

The Presiding Officer: The proposed amendment will be read for the information of the Senate.

The Secretary: After line 11 on page 67 insert:

'That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.'

The amendment was agreed to."

The history of the enactment of Section 357 conclusively shows that it was offered as an amendment, separate and distinct from the other portions of Section 3, as well as all of Section 4 of the Act, and such amendment grants an additional and exclusive method, by condemnation, of acquiring allotted Indian lands for public purposes. The Circuit Court (R. 86) quotes Section 4 of the Act of March 3, 1901 (25 U. S. C. A. 311), which grants authority to the Secretary of the Interior to grant permission to proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, both through Indian Reservations or through any lands which may have been allotted in severalty to the Indians under the laws or treaties. In its opinion (R. 87) the Court also refers to the first part of Section 3 of the Act of March 3, 1901 (25 U. S. C. A. 319) which relates to the power of the Secretary of the Interior to grant rights of way in the nature of an easement for telephone and telegraph lines through both Indian Reservation lands and lands allotted in severalty to Indians. The last paragraph of said Section 3, being 25 U. S. C. A. 357, upon which the State relies in this proceeding, follows this

section pertaining to telephone and telegraph lines and rights of way therefor.

The Circuit Court, it is urged, is in error in interpreting the other two sections of the Act of March 3, 1901, namely 25 U. S. C. A. 311 and 319, as being controlling and decisive as to the powers of the Secretary of the Interior where a condemnation is brought for any public purpose under the terms of Section 357. It is pointed out, and here stressed, that Section 311 pertains only to the establishment of roads through Indian Reservations, including allotted Indian lands, while Section 319 pertains solely to the right of way for telegraph and telephone lines through Indian Reservations, including allotted Indian lands, both sections requiring the prior consent and permission of the Secretary of Interior. Section 357, on the other hand, is greater in scope insofar as allotted Indian lands are concerned as this section permits the acquirement by condemnation *for any public purpose*. Assuming that the State were condemning allotted Indian lands under authority of Section 357 for public park purposes, would the Circuit Court have construed such right to condemn as being subject to Section 311 which concerns only the granting of road easements? We think not.

The Circuit Court has construed the right of condemnation of the State as being subject to the permission or consent of the Secretary of Interior to so condemn. It is urged that the State's right to condemn such lands under Section 357 is a separate and distinct right as differentiated from the right of obtaining by negotiation a highway easement from the Secretary of Interior. One power is complementary of the other. It provides an alternative method of acquiring necessary easements for roadway purposes in the event the Secretary of Interior refuses to grant a highway easement.

Section 357 recognizes the power of the public agency or the State to take such lands for any public purpose. At the same time the rights of the Indian allottees who, for the purpose of condemnation under Section 357, are considered as owners in fee, are safeguarded by requiring compensation to be made for that which is taken. Sections 311 and 319 authorize the Secretary of the Interior to grant easements and permits. Section 357 upon which the State relies, gives the power to condemn. The existence of these two powers side by side, enables the parties concerned to provide for the public well-being by agreement, and if agreement be impossible, then by and through the power of eminent domain. They are distinct and separate remedies.

In this connection it is worthy to note that the compilors of United States Code which was adopted by the 69th Congress, have placed these three sections (311, 319 and 357) derived from the Act of March 3, 1901, separately and in their proper places with respect to the subject matter, thereby apparently following the intent of Congress. It will be noted that under Title 25 U. S. C., which pertains solely to Indians, Sections 311 and 319 are placed therein under Chapter 8 which concerns various rights of way and easements, whereas Section 357 is placed under Chapter 9 which relates to lands allotted in severalty to individual Indians.

3. *Construction, interpretation and application of Section 357 by the Department of Interior.*

What has been the construction of Section 357 by the Department of Interior since its enactment on March 3, 1901, and what has been the practice and procedure of that Department with relation thereto? That Department has placed its own interpretation upon Section 357 since its

enactment and has further made rules and regulations in accordance therewith. The Secretary of the Interior, in order that there might be no mistake as to the meaning and effect of Section 357, requested an opinion from the Solicitor, and on January 2, 1923, a decision was rendered by the Secretary of the Interior of the same date. This decision will be found reported in the decisions of the Department of Interior relating to public lands, Volume 49 Land Decisions, page 396. We earnestly urge the Court to read this decision in full as it reviews not only the Act of March 3, 1901, pertinent hereto, but also prior land decisions of the Department, and opinions of the Attorney General. The Circuit Court's decision is diametrically opposed to this and other land decisions, as well as the Interior Department's rulings and regulations issued in conformity therewith.

It will be noted in this land decision that the Department holds Section 357 as being an alternative remedy for the acquirement of lands for public purposes and is a separate and distinct remedy by eminent domain proceedings. Attention is particularly called to the following, found on pages 398 and 399 as follows:

> "The fact remains, however, that allotted Indian lands can still be condemned for public purposes where necessary under the provisions of the Act of March 3, 1901, supra. In other words, the remedy resting there is simply an *alternative one rather than a concurrent or an exclusive procedure.* (Italics ours.) . Even prior to the Act of March 3, 1901, this department held that a State could condemn allotted Indian lands for public purposes. See 19 L. D. 24. Again, the provisions of that Act came before this Department in 1905 and in an opinion dated May 11, 1905 (unreported) the then Assistant Attorney General for this Department held that under the provisions of that Act and of certain statutes

of the State of Utah, lands allotted to the Indians within the Utah Reservation could be condemned in favor of persons or corporations desiring to acquire rights of way for canals, ditches, etc. In concluding that opinion it was said: 'These quotations from the law of Congress and the laws of the State answer the inquiry and leave no room for discussion or argument. Indian allotments are subject to be condemned for public purposes under the laws of the State or territory where located, before the issue of final patent, to the same extent as if the allottee held the fee to the land. The use of the land for right of way for irrigating ditches is declared by the law of Utah to be a public use in support of which the right of eminent domain may be exercised.'"

See 35 L. D. 648 and 45 L. D. 563.

In conformity with the Department of Interior's interpretation of Section 357 and the policy and practice consistently pursued and followed, the Department issued its printed regulations concerning "Rights of Way Over Indian Lands", printed in 1929 and issued and approved by the Department of Interior under date of May 22, 1928. Sections 68, 69 and 70 of the printed regulations, page 11, under the heading of "Condemnation of Allotted Lands", are as follows:

"68. The condemnation of allotted Indian lands for any public purpose in accordance with the laws of the State wherein the lands are situated is authorized by the last paragraph of section 3 of the act of March 3, 1901 (31 Stat. L. 1058-1083-1084).

69. Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the act of March 3, 1901, above cited.

70. The superintendent or other officer in charge is expected to keep in close touch with matters affecting the interests of the Indians within his jurisdiction and

to report immediately through the Commissioner of Indian Affairs when any condemnation proceedings are instituted. All information available regarding such proceedings, particularly a description of the lands involved, should be given so that the Department of Justice may be requested to enter an appearance in such proceedings in behalf of the owners and to take such other action for their protection as may be warranted by the law and the facts."

To summarize, therefore, the Department having charge of Indian lands and affairs has, since 1894, and both prior and subsequent to the enactment of Section 357, administered and interpreted the law so as to permit and authorize the condemnation of lands allotted in severalty to individual Indians for any public purpose under the laws of the state or territory where the lands are situated and for such purpose the lands are deemed to be held in fee by Indians and damages paid to such allottees. This covers a period of over 40 years and this court has repeatedly laid down the rule that the construction and application for a long period of time of a law by the department or branch of government administering said law shall not lightly be set aside. This rule is aptly stated in the case of Swendig vs. Washington Water Power Company, 265 U. S. 322, concerning the interpretation by the Interior Department of certain acts of Congress relating to Indian lands as reported in Land Decisions, as follows:

"The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the execu-

tive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.' Logan vs. Davis, 233 U. S. 613, 627."

Further in the case of United States vs. Jackson, 280 U. S. 183, the court on page 193, said:

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration (cases cited); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

In construing an Act of Congress which had been interpreted in a certain manner by the War Department and opinions of the Attorney General of the United States for nearly thirty years, Chief Justice Taft in the case of Wisconsin vs. Illinois, 278 U. S. 367, on page 413 stated:

"This construction of section 10 is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. U. S. vs. Minn., 270 U. S. 181, 205; Swendig vs. Washington Water Power Company, 265 U. S. 322, 331; Kern River Company vs. U. S., 257 U. S. 147, 154; U. S. vs. Burlington & Missouri River R. R., 98 U. S. 334; U. S. vs. Hammers, 221 U. S. 220, 228; Logan vs. Davis, 233 U. S. 613, 627. The practice is shown by the opinion of the acting attorney general, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the act. This was followed by the permits subsequently granted, down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports."

It is urged, however, that Section 357 supra, is neither doubtful nor ambiguous in any sense. It is also pointed out that up to the time of the decision of the Circuit Court in this case, that there was no doubt or misunderstanding as to the construction of the terms of this statute, as evidenced by the administration of said act and the practice followed by the Interior Department. The decision of the Circuit Court in the instant case has, contrary to the Government's own regulations and Land Decisions, and the practice and procedure consistently followed, created a confused and chaotic condition jeopardizing all former condemnation proceedings through lands of this type conducted and consummated by the State of Minnesota, as well as other states.

For example, the State of Minnesota by its Attorney General during the past ten years has successfully concluded six separate condemnation proceedings for highway purposes for the taking of lands allotted in severalty to individual Indians. These proceedings were instituted and completed in the State courts and included land in Carleton, Itasca, Cass, St. Louis and Becker Counties and involved the taking for trunk highway purposes of 79 separate parcels of allotted Indian lands. In all of these condemnation proceedings the individual Indians were named as respondents, as well as the Indian Superintendents. The Department of Interior likewise in these cases fully cooperated with the State in conformity with the established practice and procedure and regulations of said Department concerning the acquirement of right of way for public purposes through such allotted lands, pursuant to the rules and regulations of the Department of Interior heretofore referred to. (Regulation 70 supra, Department of Interior). It is pointed out and stressed that the present proceeding is in all respects similar to the

other six condemnation actions. The instant case marks the first time in which the United States through the Department of Interior has objected in any wise or manner to the acquirement of right of way for a state and national trunk highway through allotted Indian lands.

In none of these cases was the express consent of the Secretary of Interior obtained, which the Circuit Court now holds to be necessary (R. 90). The State, therefore, in accordance with the Department of Inferior's regulations 68 and 69 supra, conducted its condemnation proceedings pursuant to Section 357, which proceedings, the regulations state, are authorized by such section and that any purpose for which private lands could be condemned under state laws is held to be a public purpose within the meaning of said Section 357.

The clear and concise language of Section 357, together with the Federal government's own interpretation placed upon said section, as evidenced by its Land Decisions and Regulations hereinbefore quoted and consistently followed for more than thirty years, undoubtedly accounts for the great lack of reported cases concerning the right to condemn lands allotted in severalty to individual Indians. It is only at this late date and for some reason unknown to the State of Minnesota that the Department of Interior wishes to undo its interpretation of many years which has consistently been in line with good law and public policy. The United States of America and the Department of Interior, Bureau of Indian Affairs, now wishes to place a strained, unreal and unnatural construction upon this very plain statute. The State feels that the rulings of the Department should not be disturbed. To set aside such rulings would prove of great detriment to the people of the State of Minnesota and other states

and will, in fact and in effect, prevent the Department of Highways from performing a governmental function demanded to be performed by mandate of its people through both constitutional and legislative enactments.

4. *Construction of Section 357 by the Supreme Court of State of Oklahoma.*

Presumably the only party who would raise the question as to the interpretation of the act would be the Federal government itself and particularly the Department of Interior. We find after diligent search of authorities only one reported case directly interpreting Section 357. This is Shell Petroleum Corporation vs. Town of Fairfax, decided by the Supreme Court of Oklahoma on June 16, 1937, and reported in 180 Okla. 326, 69 Pac. Rep. (2d) 649, wherein the court, in connection with this subject, said:

> "It is next contended by the defendants in their original brief and their reply brief that even though it be granted that the town had power to condemn non-Indian land, the power did not extend to the right to condemn land allotted to a restricted Osage Indian.
>
> In this connection reference is made to a paragraph of Section 3 of the Act of Congress of March 3, 1901, 31 Stat. 1084 (25 U. S. C. A., Section 357), which provides 'lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.'
>
> In view of a letter purporting to be from the Commissioner of Indian Affairs, and approved by the Secretary of the Interior, dated December 24, 1936, relating to other condemnation proceedings had in the District Court of Osage County involving allotted Osage

Indian land, in which the above provision of the Act of Congress is quoted, and in which the Commissioner says, 'this law applies to Indian allotments generally, and authorizes condemnation for public purposes under the laws of the State or Territory where located,' the defendants in a supplemental brief filed May 21, 1937, apparently recedes from the position first taken that said provision did not apply to allotted Osage Indian land. They now contend that if this may be done the United States is a necessary party and the proceedings cannot be had in a state court, but must be taken in a Federal court.

With these contentions we cannot agree. The Act of Congress quoted above, granting authority to condemn lands allotted in severalty to Indians, says that such lands may be condemned under the laws of the State or Territory where located. This means the land may be condemned under the provisions of the law of the State or Territory where located. If the law of such State or Territory authorizes a town to condemn land, it may be condemned only for such purposes as the law of the State or Territory may provide. It may be condemned in the same manner. That means the same court and under the same procedure as would be the case if the land were owned in fee. If the land is owned in fee, the State court has power and jurisdiction to condemn. That act confers like authority as applied to allotted Indian land. Likewise if the land is owned in fee, the owner is the only necessary defendant. The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such land without making the United States a party."

Unquestionably the State has the right to condemn for any public purpose lands owned in fee by individual per-

sons. Section 357 concerned herein, by the terms thereof and for the express purpose of condemnation for a public purpose, places allotted Indian lands in the very same category as lands owned in fee by individual or private persons. Therefore, if the State has the power of eminent domain to condemn lands owned in fee by private persons, then likewise has the State under Section 357 an equal right to condemn allotted Indian lands as such section provides specifically that the Indians for such purposes are considered the owners thereof and damages accordingly paid to them.

It is submitted that the Department of Interior, as evidenced by its Land Decisions and regulations and consistent policy pursued, has rightly interpreted the power of the State to condemn for public purposes allotted Indian lands. It must be borne in mind that this proceeding was instituted by the State of Minnesota for the location and construction of a trunk highway. It is urged that the purpose for which the allotted Indian lands are sought to be acquired herein is for an important public purpose and would prove of general and great public benefit not only to the whites, but to the Indians as well. It is recognized that modern civilization requires and demands a modern system of roads in order to take care of the increasing transportation problems of the State and Nation.

5. *The cases cited by the Circuit Court are not in point.*

The Circuit Court in its opinion (R. ~~84-92~~ 85-87) apparently relies on two cases in interpreting the Act of March 3, 1901, 25 U. S. C. A. 357, namely Utah Power and Light Company vs. United States, 243 U. S. 389, and the case of United States vs. Colvard, 89 Fed. (2d) 312, which cases, it is here pointed out, are in no manner related to or determinative

of the legal effect or interpretation of Section 357 supra, and these decisions in no way aid or assist in the solution of the present controversy, for the reasons hereinafter stated.

In Utah Power and Light Company vs. United States, supra, the power company, without the benefit of any condemnation proceeding or without seeking and obtaining the permission of the Secretary of the Interior, trespassed upon a Federal forest reservation by constructing thereon certain power lines. The United States brought an action to eject the power company, and was successful in so doing, the court holding that the power company must comply with the regulations of the Secretary of Interior or move off the Federal forest reservation. This case concerned Federal forest lands and not Indian reservation lands or the type of land concerned herein, namely, lands allotted in severalty to individual Indians. Naturally there was no construction placed by this court on Section 357, supra, and inasmuch as the power case and the instant case concern two different matters, as well as different Federal statutes, it is apparent that no parallel can be drawn between the two which would be in any way effective or determinative of the question raised in the instant case. The Circuit Court in its opinion wholly failed to distinguish between the Utah Power and Light Company case and the instant case and it is urged that the Utah Power and Light Company case, supra, can in no manner be controlling as to the interpretation and construction of Section 357.

The Circuit Court, as the other main authority purporting to substantiate its decision, cites and quotes from a decision of the Circuit Court of Appeals of the Fourth Circuit, United States vs. Colvard, 89 Fed. (2d) 312 (R. 86). That Court stated that the Colvard case involved the building of

a highway across lands held by the United States *in trust for two Indians.* But that statement is in error. The Colvard case in truth and in fact, relates to land held by the United States in trust for the Eastern Band of Cherokee Indians. We have carefully examined the record and briefs in that case. The facts are that the Eastern Band of Cherokee Indians conveyed *tribal land* by deed dated July 21, 1925, to the United States of America in trust for said tribe and for the uses and purposes of the Act of June 4, 1924, 43 Stat. L. 376. The land was so held by the United States and *was not allotted to any individual Indians.* The defendants in that case had a sawmill adjoining the premises owned by the United States and in order to obtain access to said sawmill, had constructed a cartway over and across said tribal lands. They had been notified to desist and later undertook to have a cartway or roadway laid out over said lands in a proceeding in the State Court of North Carolina and pursuant to North Carolina laws. Such proceeding to lay out the cartway was brought by the defendants in their own name against the Eastern Band of Cherokee Indians and against two individual Indians who resided, as occupants only, on the lands affected. The United States brought the action against Colvard et al. in the United States District Court to enjoin them from using this cartway. The main question presented in that case was whether or not said District Court had jurisdiction in the action to protect the lands so owned by the United States in trust for the Indian Tribe. The other questions raised were as to the title of the United States in said lands which was particularly a local question as there were various transfers and special acts of Congress in relation to these lands in North Carolina and affecting the Eastern Band of Cherokee Indians in said state.

The government in its brief in said Colvard case clearly set out that under the authority of the Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, Congress could permit the condemnation of these lands in accordance with State laws, *but that there was no specific Act of Congress applicable to this case granting condemnation.* The brief referred to Section 4 of the Act of March 3, 1901, 25 U. S. C. A. 311, which does not grant condemnation but merely gives the Secretary of the Interior power to authorize the establishment of highways through any *Indian Reservation.* Section 3 of the Act of March 3, 1901, *25 U. S. C. A. 357, is not mentioned* in any of the briefs submitted in that case for the obvious reason that said section did not apply to the lands therein involved as such lands were not allotted Indian lands. The two Indians named in the proceeding to acquire the cartway were merely occupants and did not hold trust patents from the government. The government particularly brings this out in its Reply Brief and stated it does not appear in this case that there are "individual Indians claiming this property."

The Circuit Court in the instant case in its opinion was, therefore, obviously in error in stating that the lands were held by the United States in trust for two Indians which would imply allotments to two Indians.

The United States now concedes that the Circuit Court in the instant case was in error as is unmistakably evidenced in its "Supplemental Memorandum for the United States", submitted in connection with the State's petition for writ of certiorari herein. In said memorandum and in reference to United States v. Colvard, supra, it said: "The land concerned there was, as the Attorney General points out, tribal rather than allotted lands."

The Circuit Court in its decision has ignored the practical construction placed upon said Section 357 and has in effect negatived and made void the land decisions of the Department of Interior, as well as that Department's own regulations issued and consistently followed until the instant case.

6. *Congress, by the enactment of Section 357 (25 U. S. C. A.) grants consent to State's condemnation of allotted Indian lands, and the United States is not a necessary party nor a real party in interest in and to the State's condemnation.*

Although the State did make the United States a party in its condemnation proceeding, yet this was unnecessary as determined by the lower court order granting the State's condemnation as evidenced by said court's finding No. 2, (R. 59) as follows:

> "That the consent of the United States to bring these proceedings against Indian allottees has been expressly granted and given by the United States to the State of Minnesota pursuant to 25 U. S. C. A., Section 357, and that the United States accordingly is not a necessary party respondent to these proceedings;"

This finding of the lower trial court is in full accord and harmony with law and equity and uniform interpretation placed upon said Section 357. This finding of the lower court harmonizes with the decision of the Supreme Court of Oklahoma in the case of Shell Petroleum Corporation vs. Town of Fairfax, supra, wherein the court said:

> "The allottee is the only necessary defendant in the condemnation of lands allotted in severalty to an Indian. Since the United States may not be sued without

its consent, and no consent is given by the Act, it must be assumed that Congress intended to permit the condemnation of such lands without making the United States a party."

It is apparent that Congress in its good discretion simplified the procedure as to acquiring necessary Indian lands for State governmental functions. Congress, fully realizing the difficulty of getting the specific consent of the United States in each proceeding, enacted said Section 357 supra, and thereby granted the express right to condemn under State laws such lands for public purposes without it being necessary to make the Federal government a party respondent. Condemnation is an action in rem and the money awarded as damages stands in place and stead of the land, and consequently, the land is the subject matter of the action rather than the persons concerned therein. What interest, therefore, could the Federal government possibly have in the proceeding as it cannot share in the award for damages, or compensation? The rights of the Indians are fully protected by orderly condemnation proceedings, pursuant to State law, assuring them just compensation.

The State joined the United States of America as a party respondent primarily and only for the purpose of enabling the Federal government to act as a disbursing agency of the money awarded. The awards of compensation made by commissioners appointed by the Federal District Court (R. 67) have been paid by the State into said court to be disbursed to the Indian allottees entitled thereto under the direction of the court with the cooperation of the United States government. This is the only interest that the Federal Government has in the proceeding and, no doubt, the naming of the Indian agent as a respondent would have been sufficient in

itself. The fact that the Federal government was named as a party respondent and is not a real party in interest would, in no way, jeopardize or invalidate the legality of the proceeding or add or detract therefrom, the effect actually being the same as though the United States had never been joined as a party respondent. Section 357 authorizing the condemnation of allotted Indian lands specifically provides that the money awarded as damages shall be paid to the allottee. And therefore, insofar as payment of damages for the taking is concerned, the allottee is the same as a fee owner.

It is elementary that the United States cannot be sued without its consent given by an express act of Congress. In this case Congress has plainly, concisely and clearly given its consent to the State to condemn under its own laws lands allotted in severalty to individual Indians for any public purpose. The language is so clear and concise and so unmistakable in its terms as to leave no doubt in the mind of any reasonable person but what Congress plainly intended and did grant its consent to a proceeding of this nature.

Therefore, it is urged that Section 357, which concerns only the condemnation for public purposes of lands allotted in severalty to individual Indians, not only expressly grants the authority and consent of Congress to the State so to condemn, but also makes it unnecessary for the State to make the United States a party to the proceeding. Such was the decision in this case of the Federal District Court, District of Minnesota, contained in its order granting the State's condemnation (R. 57-58), and such was the decision of the Oklahoma State Supreme Court in the case of Shell Petroleum Corporation vs. Town of Fairfax, supra.

B.

TREATY OF SEPTEMBER 30, 1854 (10 Stat. 1109) and the ACT OF CONGRESS APPROVING, JANUARY 14, 1889 (25 Stat. 642) EXPRESSLY GRANTS LANDS NECESSARY FOR HIGHWAYS, etc., THROUGH THE RESERVATION UPON PAYMENT OF JUST COMPENSATION.

The Circuit Court erred in its failure to pass upon the legal effect, intent and purpose of the Treaty and particularly that portion of Article 3 as follows:

> "All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The court entirely ignored this basic covenant running with the land, as well as the fact that the very lands concerned with herein are lands embraced within the Indian Reservation created by virtue of said Treaty of September 30, 1854. Here again Congress by the approval of the terms of the Treaty has definitely given the consent of the United States and authorized the acquirement of all necessary roads, highways and railroads through all lands in the reservation, provided only that just compensation be paid as in other cases.

The court ignored the Act of Congress approving this Treaty on January 14, 1889, as evidenced by 25 Stat. 642. The Treaty, by the very terms thereof, grants the right of way through the reservation for all necessary roads, highways and railroads, the only condition being that compensation must be paid as in other cases. This the State has done as in its eminent domain proceeding, commissioners to ap-

praise damages were appointed and their report was duly filed with the clerk of the Federal court. In addition thereto, it is pointed out that the files in this proceeding will show that no appeals were taken from any of the awards of compensation and the State has deposited for the use and benefit of the allottees the full amount of said awards of damages assessed or ascertained by the commissioners appointed by the court. Not only is it imperative and necessary to construe Section 357 supra, but likewise the terms of the Treaty concerned with herein as above quoted, as well as the Act of Congress approving the Treaty. We are unable to find any construction or interpretation of the provision of this part of the Treaty or the subsequent Congressional act approving such Treaty. The Circuit Court ignores the question. We urge that the question is important and that the right to so construct roads through lands of this type providing compensation be paid, should be interpreted so that it may be known whether the language of the Treaty and the Congressional approval means what it so plainly states or is a nullity and surplusage.

We find numerous cases interpreting treaties and the weight placed upon the terms thereof, and it is the theory of this court that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation according to the intention of the contracting parties. Suffice it to cite a few cases.

In the case of Leavenworth L. & G. R. Company vs. U. S. 92 U. S. 733, it is held that treaties, like statutes, must rest on the words used; nothing adding thereto, nothing diminishing. This court held in Shew Heong vs. U. S., 112 U. S. 536, that a treaty constitutes a part of the supreme law of the land and should receive a fair and liberal interpretation

according to the intention of the contracting parties. And again in Baldwin vs. Franks, 120 U. S. 678, it is held that treaties made by the United States and in force are a part of the supreme law of the land and are as binding within the territorial limits of the State as they are elsewhere throughout the dominion of the United States. Also in Kenneth vs. Chambers, 14 How. 38, it is held that treaties while they remain in force are by the Constitution of the United States binding not only upon the government, but upon every citizen. A more recent case interpreting an Indian treaty is United States vs. Shoshone Tribe, decided April 25, 1938, 58 Supreme Court Reporter 794, stating in effect that an Indian treaty should not be interpreted narrowly but is to be construed in the sense in which naturally the Indians would understand it.

Such clear, concise and convincing language and interpretation placed upon treaties by this court must mean that as to this treaty it was the clear intent of not only the Federal government, but of the Indians themselves when the Reservation was created, to provide for the future development of such territory by the opening of roads and railroad lines and other facilities in order that the Indian, as well as the white man, would have these conveniences.

The question of the Treaty and particularly Article 3, granting this right, was directly raised by the State before the Circuit Court, but no reference as to this covenant or right granted is mentioned anywhere in the opinion. It is urged that the terms of the treaty alone would be sufficient to grant to the State the right to locate and construct this major constitutional trunk highway as required by the mandate of the people in the exercise of its governmental function, providing only that compensation shall be paid for such

land taken. It is submitted, therefore, that the Treaty and Act of Congress grants the right and authority to the State to acquire, by purchase or condemnation, the necessary land of the Indians for highway purposes.

C.

THE STATE'S INHERENT POWER OF EMINENT DOMAIN PERMITS THE ACQUISITION OF LANDS ALLOTTED IN SEVERALTY TO INDIANS REGARDLESS OF EXPRESS CONGRESSIONAL AUTHORITY THEREFOR.

The argument herein is made pertaining to the third question presented and No. 4 of the specification of errors. While reliance is made in this matter on the Act of Congress expressly permitting condemnation of allotted Indian lands for any public purpose and on the Treaty of September 30, 1854, we believe that this case directly concerns the inherent power of the State to condemn lands for public purposes pursuant to State law. This question should be determined directly by this Court at this time.

This is the first instance in this Court, we believe, that a State itself in a condemnation proceeding affecting lands of the United States raises this proposition of its right to condemn such lands. It is to be noted that the state trunk highway involved in this proceeding is expressly created by Article 16 of the State Constitution. Said Article 16 obviously did not attempt to give or describe the actual location of this particular trunk highway, but merely gave the general route said highway was to take through the State from the Iowa boundary to the canadian boundary. The power to definitely determine the permanent location of said highway

is delegated to the Commission of Highways, such permanent designation to be made by the Commissioner's filing of a permanent center line and width order actually describing the course of the road and the lands affected.

The Minnesota Supreme Court in State vs. Voll, 155 Minn. 72, 192 N. W. 188, held that Article 16 determines that the taking of the right of way necessary for the trunk highway system is for a public use and that the Commissioner of Highways and not the court under the Highway Act, Chapter 323, Laws of 1921, (Section 2554, Subd. 1, Mason's Minnesota Statutes of 1927) is the agency to determine the location of and what land is necessary for the right of way for trunk highways.

Where such designation of a trunk highway involves the taking of lands already devoted to another public use, the courts determine which public use is supreme or paramount. The United States, holding lands within the State, should be in the same category in this respect as public corporations or political subdivisions of the State, except that as to United States lands, the Federal Courts should make this determination.

Eminent domain is one of the highest attributes of the sovereign. In many of the earlier decisions the validity of the exercise of this right of eminent domain by the State over the lands of the United States was recognized. United States vs. Railroad Bridge Company, 6 McLean 517, Fed. Cas. No. 1614; United States vs. Chicago, 7 How. 185, 12 L. ed. 660; Ill. C. R. Co. vs. Chicago B. & N. R. Co. (C. C.), 26 Fed. 477. In United States vs. Railroad Bridge Company, supra, the question involved was whether or not the State could acquire an easement for a roadway over lands owned by the United States. The court stated that the

power has been exercised by all the States in which public lands of the United States have been situated and that such power is essential to the prosperity and advancement of the country. The court further said:

> "It is difficult to perceive on what principle the mere ownership of land by the general government within a state should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it."

Apparently this theory of law was followed by the States, at least until 1917. As heretofore called to the attention of the court, so far as Indian lands were concerned, the Department of the Interior on June 25, 1894, held that a State could condemn allotted Indian lands for a public purpose, 19 Land Decisions 24, supra.

It is interesting to note that apparently prior to 1875 it was commonly believed that the United States itself could not by direct condemnation proceedings acquire property within the states for its own uses without consent of the State. This court in Kohl vs. United States, 91 U. S. 367, decided in 1875, discussed this theory and rightly held that the United States has the same inherent right of eminent domain as exists in the States; that the Government is as sovereign within its sphere as the States are within theirs, although its sphere is limited. This case further discussed the proposition that the two distinct and separate sovereigns within the same territorial space are independent of the other and neither is under the necessity of applying to the other for permission to exercise its lawful powers.

In Van Brocklin vs. State of Tennessee, 117 U. S. 151, this court discussed United States vs. Railroad Bridge Company

supra, as to the State's right of eminent domain over lands of the United States without the consent of the United States. As the question in that case involved taxation by a State, the court did not pass upon the eminent domain question, but said on page 162, "When that question shall be brought into judgment here, it will require and receive the careful consideration of the court." The question is now being brought directly to this court by a State itself seeking to acquire a highway right of way across allotted Indian lands held in trust by the United States.

The Circuit Court in the instant case quotes from the case of Utah Power and Light Company vs. United States, 243 U. S. 389 (R. 88), which case was decided in 1917. We also call the attention of the court to the case of the same title, Utah Power and Light Company vs. United States, 230 Fed. 328, 4 A. L. R. 535, annotated on page 548. These cases did not involve a direct condemnation proceeding against Federal lands brought by the State itself, but did involve the placing of power lines across a Federal forest reservation without the right being acquired by condemnation proceedings or permission of the Secretary of the Interior. The United States brought the action to eject the power company and one of the defenses raised was that the power company could have acquired the right over and across such lands by condemnation proceedings. The courts in both cases dispose of this theory by holding to the effect that the Federal Forest Reserve lands involved are not subject to the power of eminent domain without the consent of the United States.

While the language in these cases is strongly against the contention here raised, we believe that the facts and circumstances of said cases may have had considerable bearing in the result. These cases are certainly not in harmony with

the earlier cases heretofore cited. The importance of this court passing on this question at this time is now stressed, particularly where the State is directly involved and also because of the great change in conditions since 1917.

In recent years the national government has, to an enormous extent, acquired vast areas of land in the states of the Union for various governmental purposes. These acquisitions have been made for wild life game refuges, forest reserves, rural re-settlement rehabilitation, housing, dams, power plants, and other public projects of various natures.

This court has been called upon in the past year or two to rule as to the concurrent jurisdiction over lands acquired by the government in these great projects. We refer, for instance, to the case of Silas Mason Company vs. Tax Commission, decided December 6, 1937, 302 U. S. 186. We also refer to James v. Dravo Contracting Company, 302 U. S. 134, decided the same date, and we quote from page 148 thereof, as follows:

> "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the government expand and large areas within the States are acquired."

It is obvious from the reading of these two recent cases that the question of concurrent jurisdiction over such lands is an important one. While these cases involve taxation, in effect they hold that the States are not entirely debarred from exercising their legislative authority over such lands. We believe that the mere ownership of lands in a State should not debar that State from the exercising of that attribute of sovereignty, the inherent power of eminent domain, particularly where the public purpose is as important as the

acquisition of an easement for a major constitutional trunk highway, required under the State constitution and laws, as in this case. It is obvious that such right should meet the test of the courts as to whether or not the taking is for a purpose not prejudicial or inconsistent with the use of the lands by the government. The test would be not only that, but whether the use is clearly supreme or paramount to the purpose for which it is being used, as both uses are in the ultimate taken for the public good and the people of the State and Nation. It would appear that the public would in no case be the loser. Both the United States and the States are created and operate for their citizens.

The question of paramount public use would necessarily be decided in a court of the United States. This could place no hardship upon the United States. This very feature is discussed in United States vs. Lee, 106 U. S. 196, which involved a claimed title to certain lands adversely to the United States, the latter title being based upon a tax title. This court said in its concluding paragraphs that no case can arise in a State Court where the interests, the property, the rights or the authority of the Federal government may come in question which cannot be removed into a court of the United States. It was said:

> "The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands. * * * From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority."

If these vast areas acquired by the Federal government are to prove an insurmountable barrier insofar as the exercise of the State governmental functions are concerned, then

indeed would chaos reign. This court has recognized the necessity of both the Federal and State governments cooperating for the public good where the State's performance of its required governmental functions would not be prejudicial, but in fact, be beneficial to the public. Such lands should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose where such added use would not be inconsistent with or defeat the first purpose.

VIII.

CONCLUSION.

WHEREFORE, Petitioner, State of Minnesota prays that the judgment of the United States Circuit Court of Appeals, Eighth Circuit, be in all things reversed and that the order of the Federal District Court, District of Minnesota, Fifth Division, granting the State's condemnation, be in all things affirmed,

Respectfully submitted,

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